IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated.: 20.01.2007

CORAM:

THE HONOURABLE MR. JUSTICE K.MOHAN RAM

Second Appeal No.789 of 2006
and M.P.No.2 of 2006

Inbamathi .. Appellant/Appellant/Plaintiff

-Vs-

1. Ramar
2. Annadurai
3. Kasi Rajan .. Respondents/Defendants/Defendant 2 to 4

APPEAL under Section 100 of the Code of Civil Procedure against the judgment and decree of the Additional Subordinate Judge, Virudhachalam made in A.S.No.104 of 2003 dated 28.09.2004 preferred against the judgment and decree of the Principal District Munsif, Virudhachalam made in O.S.No.625 of 1992 dated 28.07.2003.

For Appellant : Mr. P.Valliappan for M/s V. Anand

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J U D G M E N T

The unsuccessful plaintiff in O.S.No.625 of 1992 on the file of the Principal District Munsif Court, Virudhachalam, who has lost before the Courts below has filed the above second appeal.

2. The appellant filed the suit for declaration of her title to the suit properties and for permanent injunction restraining the defendants from interfering with her possession.

3. The brief facts of the case are as follows:-

The appellant claims title under a registered sale deed, dated 23.12.1991 executed by one Thaialnayaki. Thaialnayaki is said to have executed a mortgage deed in favour of the plaintiff on 13.08.1991 for a sum of Rs.10,000/- and she is said to have obtained a further loan of Rs.14,000/-. The appellant claims to be in possession and enjoyment of the suit properties from the date of purchase and the first defendant has no right to the suit properties. Pending the suit, the first defendant died and according to the appellant since there is no legal heir, none was added as Legal Representative of the first defendant. According to the appellant,

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though the defendants have no right to the suit properties, as they interfered with the possession of the appellant, they have been impleaded as defendants.

4. The fourth defendant filed a written statement which was adopted by the third defendant. The defendants resisted the suit raising the following defence, namely:-

The suit properties did not belong to Thaialnayaki absolutely and the purchase by the appellant is disputed and the possession is fully with the fourth defendant. The sale deed is not binding on the defendants and the said saie deed is not valid in law. The alleged loan obtained by Thaialnayaki is not admitted. The loan transaction is a fraudulent one. It is the specific case of the defendants that the suit properties originally belong to Mookapadayachi and he executed a Will, dated 11.02.1939 creating a Trust in respect of the suit properties and other properties. As per the said Will, Thaialnayaki had no right to alienate the suit properties and even if she alienates it is not valid. Defendants 1, 3 and 4, as legal heirs, are entitled for the Trust property as per the Will. Thaialnayaki expired on 30.01.1992. It is false to plead that the defendants are trying to trespass into the suit properties. There is no cause of action for the suit. On the above said pleadings, they prayed for dismissal of the suit.

5. An additional written statement was filed by the third defendant which was adopted by the fourth defendant. The additional written statement is to the following effect:-

The suit property is not the exclusive property of Thaialnayaki and she had no right to alienate the same and therefore the appellant cannot claim any right under the sale deed. In respect of the suit properties, a joint patta was issued in favour of Thaialnayaki and one Chinnapillai. The said fact is borne out in the Chitta, Adangal and in the 'A' Register pertaining to fasli 1384 and 1385. Under the Will, Mookapadayachi had bequeathed 'A' schedule property to Thaialnayaki and 'B' schedule property to Karupayee, who is his second wife and 'C' schedule property to Chinnapillai and all of them have been given only life estate and after the demise, the properties were to go to Thiruvenkadam and Chakravarthy and they have to hold the property in Trust for Charitable purpose. Defendants 3 and 4 are in joint possession and enjoyment of the suit properties. Chakravarthy's wife is Amsalai and Chakravarthy's daughters are Amudha and Jayalakshmi and they are the joint owners of the properties and they have not been impleaded as parties in this suit and therefore the suit is liable to be dismissed for non-joinder of necessary parties. Further in pursuance of the Will dated 11.02.1939, the said Chinnapillai filed a suit in O.S.No.293 of 1995 against Thaialnayaki, Karupayee and Chokkalinga Padayachi and has obtained a decree against them in respect of trees in the suit properties. The said decree is binding on the said Thaialnayaki and

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the appellant. According to the appellant, there is no entry in the Sub-Registrar's Office for having discharged the mortgage loan of Rs.10,000/-. The appellant is not a bona fide purchaser. The said deed has not come into effect and the appellant has not paid any costs. On the above said pleadings, the defendants sought for the dismissal of the suit.

6. After framing appropriate issues the suit was taken up for trial and during trial the appellant was examined as P.W.1 and three other witnesses were examined as P.Ws.2 to 4 and on the side of the appellant Exs.A-1 to A-5 were marked. On the side of the defendants, the third defendant was examined as D.W.1 and one Rayappan was examined as D.W.2 and on the side of the defendants Exs.B-1 to B-10 were marked and Exs.X-1 to X-5 were also marked.

7. The Trial Court on a careful consideration of the oral and documentary evidence adduced in the case dismissed the suit. Being aggrieved by that the appellant filed A.S.No.104 of 2003 before the Additional Sub-Court, Virudhachalam and the appeal was also dismissed. Being aggrieved by that, the above second appeal has been filed.

8. Heard Mr. P.Valliappan learned counsel appearing for the appellant.

9. The learned counsel for the appellant submitted that the Courts below have committed an error of law in denying the benefits under Section 64 of the Indian Trusts Act, 1882 to the appellant as she has established that she is a bona fide purchaser for value. The learned counsel further submitted that the Courts below are not correct in dismissing the suit in the light of the provisions contained in Section 41 of the Transfer of Property Act. In support of his contentions, the learned counsel relied upon the decision reported in A.I.R. 1972 Calcutta 88 (Jayanta Mohan Chatterjee Vs. Jagat Mohan Chatterjee and others) and A.I.R. 1991 Karnataka 273 (Seshumull M.Shah Vs. Sayed Abdul Rashid and Others).

10. To appreciate the contentions put forth by the learned counsel for the appellant, it will be useful to refer to Section 41 of the Transfer of Property Act and Section 64 of the Indian Trusts Act (hereinafter referred to as "the Act").

> "41. Transfer by Ostensible Owner. - Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had

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power to make the transfer, has acted in good faith".

"64. Saving the rights of certain transferees.-- Nothing in Section 63 entitles the beneficiary to any right in respect of property in the hands of -

(a) a transferee in good faith for consideration without having notice of the trust, either when the purchase-money was paid, or when the conveyance was executed, or

(b) a transferee for consideration from such a transferee.

A judgment-creditor of the trustee attaching and purchasing trust-property is not a transferee for consideration within the meaning of this Section.

Nothing in Section 63 applies to money, currency notes and negotiable instruments in the hands of a bona fide holder to whom they have passed in circulation, or shall be deemed to affect the Indian Contract Act, 1872 (9 of 1872), Section 108, or the liability of a person to whom a debt or charge is transferred".

11. In A.I.R. 1972 Calcutta 88 (referred to supra) in paragraphs 18 and 19 it is observed as follows:-

"18. .... It would also appear incongruous that while under Section 64, according to the appellant, protection is given to purchasers in good faith without notice while the third party in exchange in similar circumstances would be denied of the protection for no apparent reason and the same will be the position in regard to mortgages."

19. .... It would, therefore, appear that there could not be notice of any trust in the said circumstances and to impute the knowledge of a trust on the Society from the statement of account would be beyond reasonable scope of enquiry. For all these reasons, we are of opinion that the society at the time of execution of the mortgage deed acted in good faith and without any knowledge of the trust and is therefore entitled to protection under Section 64 of the Act".

12. In A.I.R.1991 Karnataka 273 (referred to supra) in paragraph 7 it is observed as follows:-

"7. .... The second submission must also be rejected. S. 41 of the Transfer of Property Act is in the nature of an exception to the rule that a person cannot confer better title than he has. The section provides that a transfer shall not be voidable on the ground that the transferor was not authorised to make it where, with the consent express or implied of the real owner, the transferor is the ostensible owner of such

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property and transfers the same for consideration. The section obliges the transferee in all such cases to make reasonable enquiries to ascertain that the transferor had power to make the transfer, and in addition the transferee must have acted in good faith. This is based on the principle of equity that one, who allows another to hold himself out as the owner of an estate and a third party purchased for value from the apparent owner in the belief that he is the real owner, the man, who so allows the other to hold himself out, shall not be permitted to recover upon his secret title, unless he can overthrow that purchaser by showing either that he had direct notice or something which amounts to constructive notice of the real title, or that there existed circumstances which ought to have put him upon an enquiry, which if prosecuted would have lead to a discovery of it. (See Ramcoomar Vs. Macqueen (1872) 52 Ind App Sup 40).

It is equally well settled, and the section is quite clear, that the real owner must have by his consent express or implied held out the ostensible owner as the owner of the property. If either by words or by conduct, he induced others to treat such a person as the real owner and to do that from which they might have abstained, he cannot question the legality of the Act to the prejudice of those who acted in good faith: Mere possession of a Manager cannot be treated as ostensible ownership with the consent of the real owner. In every case, where a transferee for valuable consideration seeks protection u/S.41 of the Transfer of Property Act, he must show that it was the real owner, who permitted or created the apparent ownership of the transferor either by express words or consent or by acts or conduct, which imply consent. Conversely, it must be held that if the real owner was not responsible for permitting or creating the apparent ownership, the protection u/S.41 will not be available to a transferee from such person because such a person cannot be said to be an ostensible owner as his claim to ownership does not arise from the consent of the real owner. In substance, before one can be considered to be an ostensible owner, it must be shown that it was with the consent express or implied of the true owner that he was enabled to represent himself as the owner of the property to a bona fide purchaser for value without notice. If it is found that the so-called ostensible owner by any fraudulent means created documents without the knowledge of the real owner and represented himself as

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> the owner of the property S.41 of the Transfer of Property Act will not protect the interest of a transferee from such a person and it must be held that the ostensible ownership of the property is not created by an act of the real owner or with his consent express or implied. Indeed such a person cannot claim himself to be an ostensible owner. S.41, in my view, incorporates a rule akin to the rule of estoppel whereby the real owner, who by reason of his conduct or express or implied consent was responsible for the creation of an ostensible ownership cannot be permitted to set up his real ownership to defeat the rights of a bona fide purchaser acting in good-faith and who despite reasonable enquiries could not discover such real ownership. It is, therefore, the conduct of the real owner which gives rise to an enquiry in favour of a bona fide purchaser acting in good faith. S.41 is a statutory recognition of this equitable rule".

13. Basing reliance upon the above said observations contained in the above decisions, the learned counsel for the appellant submitted that under Ex.B-1-Will, a Trust is created by the testator and therefore the defendants are not entitled to claim any right over the suit properties as per Section 63 of the Act. The learned counsel further submitted that the appellant is a transferee in good faith for consideration without having notice of the Trust and even when the purchase-money was paid, or at the time the sale deed was executed, the appellant was not aware of the trust and the appellant has purchased the suit property in good faith for consideration and as such the Courts below ought to have granted a declaration of title in favour of the appellant.

14. This Court is unable to accept the said contentions of the learned counsel for the appellant for the following reasons:-

There is absolutely no pleading on the part of the appellant to show that she was not aware of the creation of the Trust and she had no knowledge about the Trust and she had purchased the suit properties in good faith for consideration. Section 64 of the Act gives protection to the purchasers in good faith without notice, therefore it is incumbent on the part of the appellant to have raised appropriate pleadings as to how she is entitled to claim the protection under Section 64 of the Act and adduced evidence to show that the appellant had no notice. As pointed out above, no plea has been raised based on Section 64 of the Act and there is no plea regarding the steps taken by the appellant to investigate the title of the properties. In the absence of appropriate pleadings and appropriate issues, the above said contentions raised by the learned counsel for the appellant cannot be decided in the abstract, such

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plea having not been raised before the Courts below, no exception can be taken to the correctness of the judgments of the Courts below. Unless the factual foundation is laid, claiming benefit under Section 64 of the Act and to prove the same, acceptable legal evidence is adduced, the claim of the appellant based on Section 64 of the Act cannot be entertained. Therefore, this Court is of the considered view that the legal principles laid down in the decision reported in A.I.R.1972 Calcutta 88 (referred to supra) cannot be applied to the facts of this case for want of appropriate pleadings.

15. Now coming to the contention put forth by the learned counsel for the appellant based on Section 41 of the Transfer of Property Act, at the out set, it has to be pointed out that no pleadings whatsoever has been made in the plaint to attract the application of Section 41 of the Transfer of Property Act. As laid down in A.I.R. 1991 Karnataka 273 (referred to supra), in every case, where a transferee for valuable consideration seeks protection under Section 41 of the Transfer of Property Act, the transferee must show that it was the real owner, who permitted or created the apparent ownership of the transferor either by express words or consent or by acts or conduct, which imply consent. Before one can be considered to be an ostensible owner, it was with the consent express or implied of the true owner that the transferor was enabled to represent himself as the owner of the property to a bona fide purchaser for value without notice. Section 41 incorporates a rule akin to the rule of estoppel whereby the real owner, who, by reason of his conduct or express or implied consent was responsible for the creation of an ostensible ownership, cannot be permitted to set up his real ownership to defeat the rights of a bona fide purchaser acting in good-faith and who despite reasonable enquiries could not discover such real ownership. Thus, it is crystal clear that necessary pleadings setting out the above said requirements are necessary before making a claim that the vendor of the appellant was the ostensible owner of the property with the consent of the beneficiaries of the trust created under Ex.B-1-Will. When there is total lack of pleadings in this regard the contention put forth by the learned counsel for the appellant cannot be countenanced.

16. Admittedly, as pointed out above, there is no pleading in the plaint setting out the material facts as to how the appellant claims to be a bona fide purchaser for valid consideration and how the transfer made in her favour is saved by the provisions contained in Section 41 of the T.P. Act and Section 64 of the Indian Trusts Act. It is also pertinent to point out that no such issue was also framed and no evidence was let-in by either party. Had there been an issue framed and the parties adduced evidence on such issue, then, even in the absence of pleadings, it could be said that the parties to the suit were conscious of the issue involved and adduced evidence and the unsuccessful party could not be permitted to question the

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findings rendered on such issue on the ground of want of pleadings. In the instant case, there was no pleading, no issue framed and no evidence adduced. At the stage of second appeal, the appellant cannot be permitted to claim the benefit under Section 41 of the T.P. Act and Section 64 of the Indian Trusts Act, when the appellant had failed to plead the necessary material facts in the plaint and put the other side on notice. It is settled law that the opposite party should not be taken by surprise. If the facts on record warranted the application of the provisions contained in Section 41 of the T.P. Act and Section 64 of the Indian Trusts Act and the Courts below had failed to apply the same, or any legal principle applicable to the facts of the case had been failed to be applied by the Courts below, then this Court even in a second appeal can permit the appellant to raise a pure question of law, but that is not the case here. The contention put forth by the learned counsel for the appellant cannot be decided in the abstract, in the absence of necessary pleadings.

17. It is pertinent to point out that in the additional written statement it has been specifically pleaded that the non-joinder of Chakravarthy's wife-Amsalai and Chakravarthy's daughters-Amudha and Jayalakshmi have been raised and it has been specifically pleaded that they are the joint owners of the properties and as such they are necessary parties to the suit and in view of their non-impleadment, the suit is bad in law and liable to be dismissed for non-joinder of necessary parties but inspite of that the appellant had failed to implead them as parties. A specific issue has been framed by the Trial Court as Issue No.4 and the Trial Court has held that their non-joinder is fatal and the suit is liable to be dismissed on that ground. The said finding of the Trial Court has not been challenged either before the Lower Appellate Court or before this Court and hence on this ground also the appellant has to fail. A perusal of the judgments of the Courts below shows that the Courts below have considered the oral and documentary evidence on record and infact no infirmity has been pointed out by the learned counsel for the appellant in the reasonings of the Courts below and as such this Court finds no reason to interfere with the concurrent findings of fact arrived at by the Courts below. Further no substantial question of law arises for consideration in this second appeal.

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18. For the foregoing reasons, the above appeal fails and the same is dismissed. However, there will be no order as to costs. Consequently, the connected MP is closed.

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Asst. Registrar.

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Sub Asst. Registrar.

To

1. The Additional Subordinate Judge, Virudhachalam

2. The Principal District Munsif, Virudhachalam.

1 CC TO MR.V. ANAND, ADVOCATE SR NO 3807

S.A.No.789 of 2006 and
M.P.No.2 of 2006

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